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No. 409

In the Supreme Court of the United States

OCTOBER TERM, 1943

TENNESSEE COAL, IRON & RAILROAD COMPANY, PETITIONER

v.

MUSCODA LOCAL NO. 123, ETC., ET AL.

SLOSS-SHEFFIELD STEEL & IRON COMPANY, PETITIONER

v.

SLOSS RED ORE LOCAL NO. 109, ETC., ET AL.

REPUBLIC STEEL CORPORATION, PETITIONER

v.

RAIMUND LOCAL NO. 121, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, INTERVENER

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OPINIONS BELOW

The opinion of the District Court (R. 494–506) is reported in 40 F. Supp. 4. The opinion of the Circuit Court of Appeals (R. 4938–4942) is

reported in 135 F. (2d) 320; its opinion denying the petition for rehearing (R. 4997–5010) is reported in 137 F. (2d) 176.

QUESTION PRESENTED

Although petitioners purport to state nine different questions, they are simply different versions of the same single question: Whether time spent by metal miners in traveling underground to and from the "working face" constitutes employment or work for which compensation must be paid under the Fair Labor Standards Act.[1]

STATUTE INVOLVED

The statutory provisions involved are Sections 3 (g), 3 (j), and 7 (a). These provisions are set forth in the Appendix.

STATEMENT

This action was instituted by petitioners, three metal mining companies operating red ore mines in Jefferson County, Alabama (R. 556), under the Federal Declaratory Judgments Act (c. 512, 48 Stat. 955, sec. 274D; 28 U. S. C., sec. 400). Petitioners sought a declaratory judgment as to their liability under Section 7 of the Fair Labor

[1] The phrases "face to face" and "portal to portal" are commonly used as shorthand terms of reference in describing the basis of payment of miners. The "face to face" basis includes only time spent at the place where the miner actually drills and loads—the so-called "working face." The "portal to portal" basis includes time spent in traveling between the portal or entrance to the mine and the working "face," as well as the time spent in actual productive work at the "face."

Standards Act, for time spent by the miners descending and traveling underground to and from the working "face." The several labor unions and union officials representing petitioners employees were named as defendants and the Administrator of the Wage and Hour Division was invited to intervene. Upon petition of the Administrator, the District Court permitted the intervention (R. 304–305).

Although there are slight variations in the operating methods of the 13 mines involved here, the conditions with respect to the travel time are substantially similar. For many years, at all the mines except the two operated by the Sloss Company,[2] the miners have been required to check in and hang up individual brass checks on a tally or check-in board (R. 787, 2658, 2733, 2741, 2745). No employee has been permitted to enter petitioners' mines without depositing his brass check at the tally house at the entrance of the mines (*ibid.*). The check-in board, as many witnesses stated, graphically informs the mine foreman, the assistant mine foreman, head miners, or foremen of the particular service crews, if and when all of the members of the respective crews are "on the job" and ready for work (R. 561, 787, 963, 3043–3044).

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[2] At the Sloss mines the employee formerly went to the tally house and "would tell the boss man 'I am here'" (R. 2797).

At this point the appropriate representative of the company will make provision for vacancies in the working crew (R. 561, 2432, 2509, 2734, 2739, 3031, 3043–3044, 3099), will instruct the crew or its head miner to change the regular working place should that be necessary, and give additional operating instructions (R. 561, 2740, 2741, 2728–2731, 3032, 3097, 3114). Numerous witnesses testified that the head miners are told by the mine foremen at the tally house or in its immediate vicinity how to proceed with their day's work (R. 2728–2730, 2740, 2746), how to overcome certain problems confronting them in their mining operations (R. 2740–2741), where to obtain needed tools, equipment, timber, and supplies (R. 2402, 2730, 2743, 2752, 2959), and are given additional information not only related to their jobs but absolutely indispensable to their successful performance. The men regularly pick up, at or near the portal of the mine, or near the man loading and unloading stations, various tools and supplies required for the performance of their work at the "face"; these tools and supplies are carried by the men on their underground journey to the "working face" (R. 1716, 2400–2402, 2731, 2804–2805, 2808, 2960, 3032, 3098).

The District Court found (R. 502–503): "the evidence has made clear that the transportation was had under the strict control and supervision of the plaintiffs [petitioners]," that petitioners

"prescribed the schedule of the trips, the speed of the trips, the loading of the men into the trips, the rules of conduct during the trips, and in most cases required the men to ride the trip rather than walk" (R. 502–503). In addition, the men are subject to the disciplinary rules of the companies in the loading of the skips and throughout the trip (R. 503, 563). By reporting late at the portal of the mine, a miner might be subject to outright discharge from the services of the company (deft. ex. 29, R. 4599). As the District Court found, "Clearly, during the trips up and down the men were under the complete supervision of the plaintiffs" (R. 503).

A graphic picture was presented by the numerous witnesses of the 6,000-foot ride (R. 786) from the loading platform at the portal to the man-unloading station, either in ore skips or in man cars. Petitioners load 30 to 40 men in ore skips (R. 784, 1191, 1229, 1708, 1771–1772, 3026), and force them to ride down with bodies contorted and heads drawn down below the level of the skip top to avoid being crushed by the overhanging mine ceiling (R. 1708–1709, 2395, 2641, 2693, 2759, 3025–3029).[3] According to the finding of the District Court: "The cars have been nearly always

[3] "There is not a slope on Red Mountain where the roof clears the top of the skip more than a few inches for most of the length of the slope" (*The Ore Miner*, December 1938, deft. ex. 5, R. 4455).

crowded to the extreme. The positions which the men have been required to assume during the transportation varies from a crouch with their bodies overlying one another to a rigid propping of legs and arms against the sides of the car and the fellow passengers. These positions were assumed partially because of the press of human bodies in the cars and partially because of the necessity of keeping head and body in a deflected position in order to avoid injury from collision with low points in the roofs of the mine slopes or with projections from the roofs" (R. 502).

The many descriptions in the record[4] of injuries during the course of transportation bear witness to the fact that the descent into petitioners' mines is attended not only by the greatest discomfort and inconvenience, but also by considerable peril.

From the time they jump into the skips and descend the three to twelve thousand feet underground (R. 1262, 1308, 1565, 1663, 1838–1840; T. C. I. ex. 1, 2, and 3, R. 3587–3589; Sloss ex. 10, R. 3790; Sloss ex. 11, R. 3791; Republic ex. 1, R. 3974; Republic ex. 16, R. 4022)—in one mine 640 feet below the level of the sea (R. 3005)—the employees are in an environment entirely different from that which they have left on the surface. Immediately they became subject, as one of petitioners' witnesses admitted, to the ever present

[4] R. 972–973, 1475, 1709, 2642, 2643, 2789, 2791–2792, 3039, 3120; *The Ore Miner*, December 1938, deft. ex. 5, R. 4454–4456; *ibid.*, February 1940, deft. ex. 6, R. 4461.

dangers of falling slate (R. 1565). As stated by the District Court, "The trips were, of course, in the comparative darkness and enclosure of an artificially lighted mine. The air was humid and malodorous, the ventilation relatively poor and the heat increasing with the descent into the mine" (R. 502, 563).

Additional discomforts and perils attend the men after they are unloaded from the skips, when they continue their journey by foot (R. 504, 563). As the miners near the working headings, the atmosphere is naturally increasingly heavy with ore dust and powder smoke. Where it has been necessary to do timbering in the passageway, there is frequently the pungent odor of creosoted timbers (R. 969), and due to the complete indifference of petitioners to all problems of sanitation, the mine air is befouled with the odors of human sewage from the man-unloading station to the slopes (R. 2408, 2821-2822). "During these walks, the physical conditions encountered by the men were even more difficult than during the part of the descent spent in riding. The atmosphere becomes warmer and more humid, the ventilation even less effective and the air fetid. The roof is low in places, requiring the walkers to stoop. The footing is irregular, sometimes rough, sometimes wet and slippery, overhead wires (often not insulated or guarded) and pipes must be carefully avoided. The passageways are up and down

grades of varying steepness. In short, a very substantial amount of physical and mental energy is required during this walking" (Opinion of District Court, R. 504). "The conditions are clearly conditions peculiar to the occupation of the men in the class represented by the defendants, conditions replete with hazards, conditions requiring physical exertion and mental alertness, and conditions unpleasant and burdensome to those encountering them" (R. 502).

The District Court ruled (1) that the time in controversy (including time spent at the surface obtaining and returning lamps and tools and checking in and out) constitutes work time (R. 565), since the activities and the travel are under the control of the employers "in the interest of efficient operation of their mining business," and since "such time is a necessary and incidental part of the actual production of ore" (R. 503); (2) that there was no custom in petitioners' mines excluding such time from the workweek (R. 496, 557), and, in any event, an occupational custom or usage cannot operate to avoid the requirements of the Act (R. 499). With respect to the alleged custom, the court observed (R. 499) that "it would be a mockery of the beneficent purposes of the Act if the provisions prohibiting employment for over a specified number of hours for each workweek, except at an increased rate of compensation, were held to incorporate a custom

to pay employees only for a part of the time worked by them."

The Circuit Court of Appeals (R. 4938–42) affirmed, but modified that part of the District Court's decision which held that the time spent by employees checking in and out, and procuring and returning tools, lamps, and carbide at the surface of the mine was also working time (R. 4942).*

ARGUMENT

1. The District Court's findings that the travel time was "under the strict control" and "the complete supervision" of the petitioners (R. 502–503), that "it exacted mental and physical exertion" and was "pursued solely as a necessary incident to the prosecution of the employer's business" (R. 504, 566, 4942) suffice to bring the travel time squarely within the terms of the statute. The facts in the record, with forceful eloquence, establish that the miners are not only employed during this underground travel, but are engaged in hard work. The employer, of course, obtains more profit when the employee is drilling or loading ore than when he is descending in the skip or passing through haulageways and man-

* The Government believes that the Court of Appeals was in error in ruling that this time was not part of the working time. Since the amount of time thus consumed in this case was negligible, it is not deemed of sufficient importance to warrant certiorari.

ways enroute to the working "face." But there is nothing in the statute suggesting that compensation should be paid only for productive or active work. The statute requires that the employee be compensated for his *employment* in the production of goods for commerce and for *"any process or occupation necessary"* to such production (Sections 7(a), 3(g), 3(j); italics supplied).

The decisions under the Act are consistent in holding that such underground travel is working time. In addition to the decisions of the courts below, the District Court of Idaho, in the case of *Sunshine Mining Co.* v. *Carver,* 41 F. Supp. 60, held that underground travel in gold, silver, copper, lead, and other metal mines, constituted working time compensable under the Act. See also *Butte Miners' Union No. 1* v. *Anaconda Copper Min. Co.,* 112 Mont. 418, 118 P. (2d) 148 (1941), construing the Montana Eight Hour Law to include the "portal-to-portal" principle as applied to employment in underground mines.* Other nonproductive activities, such as waiting for work, or standing by on call, or preparation of machines and engines preparatory to productive work, which are necessary or incident to the

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* *Ex Parte Martin*, 157 Calif. 59, 106 P. 235 (1909), a 35-year-old decision of the Supreme Court of California, upon which petitioners rely (Pet. p. 22), is the single decision holding that underground travel is not part of the workday.

employment, also have consistently been recognized as constituting work time within the meaning of the Act. *Fleming* v. *North Georgia Mfg. Co.*, 33 F. Supp. 1005 (N. D. Ga.); *Reck* v. *Zarnocay*, 33 N. Y. S. (2d) 582 (Sup. Ct. N. Y., N. Y. Co. 1941); *Walling* v. *Sun Publishing Co.*, 47 F. Supp. 180, 191 (W. D. Tenn.); *Travis* v. *Ray*, 41 F. Supp. 6 (W. D. Ky.); *Walling* v. *Blue Mt. Logging Co.*, No. 380, W. D. Wash., decided October 13, 1942; *Davies* v. *City of Seattle*, 67 Wash. 532, 121 P. 987 (1912).

These decisions are in accord with the decisions interpreting analogous statutes. Particularly pertinent are the decisions under the Federal Hours of Service Act,[7] limiting the consecutive hours of service of railroad employees. In *Missouri, K. & T. Ry. Co.* v. *United States*, 231 U. S. 112,

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Principal reliance was placed upon the case of *United States* v. *Post*, 148 U. S. 124, which was apparently misinterpreted by the California court. To the extent that the *Post* decision is pertinent, it seems to be contrary to the result reached by the California court.

[7] C. 2939, 34 Stat. 1415, 45 U. S. C., sec. 61. Section 2 provides in part: "it shall be unlawful for any common carrier * * * to require or permit any employee * * * to be or remain on duty for a longer period than sixteen consecutive hours * * * *Provided*, That no operator, train dispatcher, or other employee * * * shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour-period * * *."

The term "on duty" is essentially the same as "employment" or "work." The term "work" has been defined to include "employment," "task," "duty." See Webster's Inter-

this Court held that time spent "waiting, doing nothing" while the engine was sent off for water and repairs, should be included in determining whether the employees had been on continuous duty in violation of the provisions of the Hours of Service Act. Mr. Justice Holmes, speaking for the Court, pointed out that the employees "were under orders, liable to be called upon at any moment, and not at liberty to go away.' He held that they were "none the less on duty when inactive. Their duty was to stand and wait" (231 U. S. at 119).[8] See also *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, 158, where this Court stated that "as a general rule, employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done * * *."[9] In the instant case the em-

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national Dictionary (2nd Ed.) p. 2950; *State* v. *Rose*, 125 La. 462, 51 So. 496, 497 (1910); *Chicago & A. R. R. Co.* v. *Bragonier*, 119 Ill. 51, 63, 7 N. E. 688, 693 (1886).

[8] To the same effect see *United States* v. *Southern Pac. Co.*, 245 Fed. 722 (C. C. A. 9); *Minneapolis & St. L. R. R. Co.* v. *United States*, 245 Fed. 60 (C. C. A. 8), certiorari denied, 245 U. S. 666; *San Pedro, L. A. & S. L. R. R. Co.* v. *United States*, 213 Fed. 326, 329 (C. C. A. 8); *United States* v. *Denver & R. G. R. R. Co.*, 197 Fed. 629 (N. Mex.); *United States* v. *Illinois Cent. R. R. Co.*, 180 Fed. 630 (N. D. Iowa), and *United States* v. *Chicago, M. & P. S. Ry. Co.*, 195 Fed. 783 (W. D. Wash.).

[9] It is recognized that employment under the workmen's compensation laws extends beyond employment for which wages are due. However, the above-quoted statement appears to have been an enunciation of the rule of general application, rather than of the broader rule applied in work-

ployees were under orders to report and check in at the entrance to the mine. They were required to be ready to descend according to a schedule prescribed by the employer, and they were subjected to the control and disciplinary rules of the employer during all of the time in question. It need not be denied that although the principles which determine when a man is at work for his employer are clear, they may be difficult to apply in some factual situations near the borderline. But the evidence here indicates beyond peradventure that the Court is confronted with no borderline case.

The reasonableness of the ruling that underground travel time is working time is confirmed by the fact that two of the great mining States, Arizona and Utah, since 1912 and 1937 respectively, have expressly provided that the eight hour per day limitation upon work in underground mines encompasses all time spent underground. Laws 1912, c. 28, secs. 2 and 3, p. 59, Ariz. Code Ann. (1939), vol. 4, sec. 56–115. Utah Laws (1937), c. 59, amending Rev. Stat. (1933), sec. 49–3–2.[10]

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men's compensation cases. The particular injury involved occurred before the employee reached the entrance to the employer's premises.

[10] As the Fair Labor Standards Act is not limited to one industry, but is designed to provide the standard for every kind of work, the absence of an explicit provision as to working time in mines is of no significance.

2. The essence of petitioners' position is that an alleged custom or "traditional practice" in the industry precludes recognition of underground travel time as part of the workweek. The claimed existence of such a custom, far from being undisputed as petitioners assert (pet. p. 45), was one of the most controversial issues at the trial (cf. with petitioners' claims, for example, Wage and Hour Division Report on "Hours Worked" in Underground Metal Mining, attached by petitioners as Exhibit A to their complaints, R. 79, at 85–89). This dispute as to the facts was resolved by the District Court's finding that "the evidence has disclosed no such custom" (R. 496, 497, 498).[11] This finding of the District Court would seem conclusive of petitioners' contention with respect to custom. But in any event, as the District Court appropriately pointed out, "it could not be contended that the custom prevailed to deny the defendants compensation" for activities which "actually constituted employment or work" (R. 499; 40 F. Supp. at 8). A custom which would dissipate the statutory right, like an agreement to accept less than the statute requires, is void. *United States* v. *Morley Construction Co.*, 98 F.

[11] This finding was based upon proof that during the greater part of the iron ore mining history in the Birmingham area, payment of the producing crews has been on a tonnage or task basis, "without regard to hours worked at any point". (R. 496; 40 F. Supp. 4, 7).

(2d) 781, 788 (C. C. A. 2), certiorari denied, 305 U. S. 651; *Waterman S. S. Corp.* v. *National Labor Relations Board*, 119 F. (2d) 760, 762 (C. C. A. 5); *Fleming* v. *Warshawsky & Co.*, 123 F. (2d) 622 (C. C. A. 7); *Johnson* v. *Dierks Lumber & Coal Co.*, 130 F. (2d) 115 (C. C. A. 8). In the words of the Eighth Circuit in the last cited case, "We do not think the act means that an employer may claim all of an employee's time and compensate him for only a part of it" (at p. 120).

Petitioners make a point of the Administrator's press release relating to his enforcement policy in the bituminous coal mining industry (Pet. pp. 11–12). As appears from the record, the Administrator's coal mining policy was influenced by factors not present in petitioners' mines.[12] Moreover, the release in question was only an informal declaration made by the Administrator for enforcement purposes.

3. Petitioners' assertion that the decision below erroneously fails to construe the application of the Act with reference to the period of time subsequent to May 1, 1941[13] (pet. 9, 60), is devoid of merit. This contention is simply a bid for an advisory opinion on a hypothetical statement of

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[12] R. 79, at 94–96; pl. exh. No. 4B for identification, R. 4716; pl. exh. No. 25 for identification, R. 4710–4715; pl. exh. No. 6 for identification, R. 4726, 4729–4730[2]).

[13] Subsequent to May 1, 1941, petitioners changed their method of compensation and put into effect the "portal-to-portal" basis of payment.

facts. The Circuit Court of Appeals, in its opinion denying rehearing (R. 5000), adequately answered this contention by pointing out that the court's jurisdiction was limited "to cases of actual controversy of a justiciable nature" (citing: *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace,* 288 U. S. 249; *Ashwander* v. *Valley Authority,* 297 U. S. 288, 325; *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227), and that "the plenary effect of the judgment as *res judicata* is ample protection for the future."

CONCLUSION

The decision below is correct. There is no conflict. While it cannot be said the question is unimportant, we do not believe further review is required and accordingly we oppose the issuance of the writ.

Respectfully submitted.

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NOVEMBER 1943.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201 *et seq.*):

Section 3 (g):

"Employ" includes to suffer or permit to work.

Section 3 (j):

"Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Section 7 (a):

No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

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